

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

David Austin, Individually and as
Administrator of the Estate of Bonnie
Jean Austin, Deceased,

Plaintiff,

vs.

Mount Carmel Health System d/b/a
Mount Carmel West, et al.,

Defendants.

Case No. 19 CV 0405

Judge David C. Young

**DEFENDANT WILLIAM S. HUSEL, D.O.'S MOTION FOR
PROTECTIVE ORDER AND MOTION TO STAY PROCEEDINGS
PENDING CRIMINAL PROSECUTION**

Defendant William S. Husel, D.O. ("Dr. Husel"), by and through counsel, hereby moves this Honorable Court for the entry of an order staying discovery and all proceedings in the above-captioned civil proceeding pending the final adjudication of the ongoing criminal investigation of potential criminal charges against Dr. Husel. Defendant also requests a protective order precluding Dr. Husel's deposition from taking place at this time. The legal grounds for entry of the stay and protective order are fully detailed in the Memorandum in Support, which is attached hereto and incorporated herein.

Respectfully submitted,

ARNOLD TODARO WELCH & FOLIANO CO., L.P.A.

By: /s/ Gregory B. Foliano

Gregory B. Foliano (0047239)

2075 Marble Cliff Office Park

Columbus, Ohio 43215

gfoliano@arnoldlaw.net

Phone: (614) 485-1800

Fax: (614) 485-1944

Counsel for Defendant William S. Husel, D.O.

LAW OFFICES OF

ARNOLD TODARO
WELCH & FOLIANO

2075 MARBLE CLIFF OFFICE PARK
COLUMBUS, OHIO 43215-1053
(614) 485-1800

MEMORANDUM IN SUPPORT

I. INTRODUCTION AND FACTS

On January 15, 2019, Plaintiff filed the above-captioned civil proceeding against Dr. Husel and other parties. Plaintiff asserted multiple claims against Defendants. As part of the claims against Dr. Husel, Plaintiff alleges Bonnie Jean Austin received a lethal dose of medication.

As represented in various media accounts, Dr. Husel is currently under criminal investigation by the Columbus Police and Franklin County Prosecutor's Office for actions stemming from the allegations asserted by the Plaintiff. Consequently, on advice of his counsel assisting him in that matter, Richard H. Blake, Dr. Husel will exercise his Fifth Amendment privilege against self-incrimination during the pendency of this criminal investigation in response to all questions posed by Plaintiff and other parties.

On January 25, 2019, before Defendants had an opportunity to file an Answer or even conduct any initial investigation in the claims, Plaintiff's counsel David Shroyer unilaterally noticed the deposition of Defendant Husel. Undersigned counsel explained that Dr. Husel will be asserting his constitutional rights in the civil cases and could not be made available for a deposition at this time. Instead of withdrawing the notice, Mr. Shroyer simply resent it to defense counsel. Mr. Shroyer, as a practicing attorney and officer of the court, should know that Dr. Husel has constitutional rights. He should know that having Dr. Husel sit for a deposition at this time could violate those rights. Any decent practicing attorney would know the law. Any decent practicing attorney would know there is no good legal reason for noticing the deposition at this time. Mr. Shroyer's

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ARNOLD TODARO
WELCH & FOLIANO

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reason must be a personal one: his need for attention¹. For these reasons, along with the stay, a protective order is requested.

II. LAW AND ANALYSIS

The United States Constitution provides that a person shall not be compelled to be a witness against himself. U.S. Const. Am. V. This protection applies not just to prevent a person from being called as a witness against himself in his own criminal prosecution; it also protects a person from providing discovery in a civil proceeding which could then be used against him in a criminal proceeding. *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976).

The determination of whether to issue a stay of proceedings generally rests within the court's discretion and will not be disturbed absent a showing of an abuse of discretion. *State ex rel. Wallace v. Tyack*, 13 Ohio St.3d 4, 5–6, 13 OBR 379, 380, 469 N.E.2d 844, 846 (1984); *State ex rel. Verhovec v. Mascio*, 1998-Ohio-431, 81 Ohio St. 3d 334, 336, 691 N.E.2d 282, 284. An abuse of discretion connotes an unreasonable, arbitrary, or unconscionable decision. *State ex rel. Askew v. Goldhart*, 75 Ohio St.3d 608, 610, 665 N.E.2d 200, 202 (1996).

A. This Court Should Grant A Stay Because of the Significant Overlap of Issues in This Proceeding With the Ongoing Criminal Investigation

The allegations against Dr. Husel in both this proceeding and the police investigation involve the issue of Dr. Husel's ordering of medication for patients. In answering Plaintiff's Complaint, Dr. Husel will be required to reveal the principal defenses to the very issues at the heart of the ongoing criminal investigation. In light of

LAW OFFICES OF

ARNOLD TODARO
WELCH & FOLIANO

2075 MARBLE CLIFF OFFICE PARK
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¹ Mr. Shroyer was on the television news as late as the date of this filing (February 5, 2019), claiming he was going to depose Dr. Husel on Friday (February 8, 2019), even though he knew, through discussion with counsel a week ago, that the deposition was not going forward.

the substantial overlap between issues in the civil and criminal cases, a stay of this adversary proceeding is appropriate.

Refusing to grant a stay might also expand the rights of criminal discovery beyond the limits of Rule 16 of the Ohio Rules of Criminal Procedure, expose the basis of the defense to the prosecution in advance of trial, or otherwise prejudice Dr. Husel in the criminal matter. Based upon that factor alone and the serious risks presented as a result, this Court should stay the civil proceeding.

B. This Court Should Grant A Stay Because Plaintiff Will Suffer No Resulting Harm

Staying this proceeding will not harm Plaintiff, nor will it result in a miscarriage of justice. To the contrary, any findings resulting from the criminal investigation may be incorporated by Plaintiff. Moreover, should Dr. Husel be charged and convicted of a criminal infraction, such conviction will obviate much of the expenditures in legal fees and other expenses that the Plaintiff would otherwise incur, as well as court resources and time.

Dr. Husel's interest in preserving his Fifth Amendment rights exceeds any delay that may result from a stay. Accordingly, this Court should stay this proceeding.

C. This Court Should Grant A Stay Because Dr. Husel Will Otherwise Suffer Harm and Prejudice

Because Dr. Husel intends to assert his Fifth Amendment right during the pendency of the government's criminal inquiry, he will suffer extensive harm if this Court refuses to grant a stay. No citizen should be penalized for asserting his or her constitutional right against self-incrimination. Moreover, as set forth above, Plaintiff will not be harmed by a stay.

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The harm to Dr. Husel, and any individual under criminal investigation, by not granting a stay is substantial. By requiring Dr. Husel to testify, knowing that he will assert his right under the Fifth Amendment not to do so at this time, he will be prevented from adequately defending his position and be subject to an adverse inference by a jury. While the Fifth Amendment forbids adverse inferences against parties to criminal actions when they refuse to testify, it does not forbid such inferences in civil actions. *Palmigiano*, 425 U.S. at 318.

If this Court refuses to grant a stay, Dr. Husel will be faced with the possibility that his silence will result in adverse inferences, or perhaps his testimony will be used to his detriment. Such strong interests of Dr. Husel outweigh any inconvenience to Plaintiff and thus support the staying of this proceeding.

D. This Court Should Grant A Stay to Promote Judicial Economy

Courts will stay civil proceedings where a stay promotes the efficient disposition of civil actions. Here, a stay of this case will further this interest of judicial economy. For example, the availability of transcripts and other evidence from a criminal trial may eliminate altogether the need for certain depositions. The outcome of a criminal case may also encourage settlement due to the high standard of proof required in a criminal prosecution. Moreover, many of the issues in a civil proceeding will likely be disposed of in a parallel criminal proceeding, whereas if a civil proceeding continued first, pertinent information would probably be withheld under the Fifth Amendment. Accordingly, the Court should stay this civil proceeding.

E. This Court Should Grant A Stay Because it will Further the Public Interest.

A court is justified in granting a stay where delay of the civil proceeding would not seriously injure the public interest. Here, the public interest is under no threat of serious

injury because it is the prosecutor who purports to act for the public in this case— not the Plaintiff. The prosecution of the parallel criminal matter is already underway. There is thus no public interest threat whatsoever. Accordingly, the Court should stay this civil proceeding.

F. This Court Should Grant A Protective Order

In the instant action, Plaintiff's counsel has unilaterally filed a deposition notice for Dr. Husel. This deposition was noticed just 10 days after suit was filed and before Defendant filed an Answer (or was even required to). It was noticed before Plaintiff's counsel even filed an affidavit of merit of a qualified expert as required by statute. An amended notice was filed even after Defendant's counsel explained that Dr. Husel was not going to be able to testify at that time. Due to the pending criminal investigation, it is not appropriate to compel Dr. Husel to give testimony in this civil action until the criminal investigation is concluded. As stated above, if Dr. Husel were compelled to give a deposition in this civil case, it could undermine his rights under the Fifth Amendment, expand the rights of criminal discovery beyond the limits of criminal procedure, and expose the basis of the defense to the prosecution in advance of a potential criminal trial. As such, Defendant respectfully moves this Court for a protective order.

III. CONCLUSION

In light of the foregoing, Dr. Husel respectfully requests that this Court grant a protective order and stay this proceeding pending completion of the parallel criminal proceeding.

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WELCH & FOLIANO

2075 MARBLE CLIFF OFFICE PARK
COLUMBUS, OHIO 43215-1053
(614) 485-1800

Respectfully submitted,

ARNOLD TODARO WELCH & FOLIANO CO., L.P.A.

By: /s/ Gregory B. Foliano

Gregory B. Foliano (0047239)

2075 Marble Cliff Office Park

Columbus, Ohio 43215

gfoliano@arnoldlaw.net

Phone: (614) 485-1800

Fax: (614) 485-1944

Counsel for Defendant William S. Husel, D.O.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of February, I electronically filed the foregoing with the Clerk of the Court using the ECF/eFiling system, which will send notification of such filing to all counsel of record. In addition, I certify that a copy of the foregoing has been served on the following:

John H. Burtch
Baker & Hostetler LLP
200 Civic Center Drive
Suite 1200
Columbus, Ohio 43215
jburtch@bakerlaw.com
Counsel for Defendant
Mount Carmel Health System

Talon Schroyer, R.P.H.
1017 Creekview Drive
Marysville, Ohio 43222

Yussuf Ibrow, R.N.
c/o Mount Carmel West Hospital
793 West State Street
Columbus, Ohio 43222

/s/ Gregory B. Foliano

Gregory B. Foliano (0047239)

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ARNOLD TODARO
WELCH & FOLIANO

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